COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0421-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMMY J. DICKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Reversed and cause remanded with directions*.

¶1 SNYDER, J.[1] Sammy J. Dickey appeals his judgment of conviction for operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration. Dickey argues that the trial court erred

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

when it allowed blood test results to be admitted into evidence. Dickey specifically contends there is no authority under the Implied Consent Law for a forcible blood withdrawal and that no evidence was presented that the blood withdrawal was completed by a person authorized to do so under WIS. STAT. § 343.305(5)(b). We agree that there was no evidence presented that the blood withdrawal complied with the requirements of § 343.305(5)(b). We therefore reverse the judgment of conviction and remand this matter to the trial court to allow the State to demonstrate compliance with § 343.305(5)(b). If compliance cannot be shown, a new trial is ordered at which the results of the blood test must be suppressed.

FACTS

¶2 On June 9, 2000, Dickey was stopped by City of Sheboygan Police Officer Jeffrey Metke after Metke observed Dickey driving recklessly. When Metke spoke with Dickey, Metke noted that Dickey's breath smelled of alcohol, his speech was slurred and his eyes were bloodshot and glassy; Metke also noticed a bottle of beer beneath the driver's seat. Metke administered a series of field sobriety tests which Dickey failed. Dickey was then arrested for operating a motor vehicle while intoxicated.

¶3 Metke asked Dickey to submit to a chemical test of his breath for intoxication. Dickey refused and Metke initiated a Notice of Intent to Revoke Operating Privileges. Dickey was then taken to a local hospital where a sample of his blood was forcibly withdrawn. Tests later performed by the Wisconsin State Laboratory of Hygiene demonstrated that Dickey's blood alcohol level was 0.226% by weight of alcohol in his blood. Dickey was later charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration in his blood.

¶4 On July 28, 2000, Dickey filed a motion to suppress the results of the blood test; he argued that neither Wisconsin's Implied Consent Law nor any other statute authorizes a forcible blood withdrawal, and as a result of this lack of statutory authority, the blood test results should be suppressed. The trial court denied this motion.

¶5 A jury trial was held on August 31, 2000. At the trial, medical technologist Brian Thill, who signed the blood/urine analysis form indicating that he had collected the blood sample, testified on direct examination that he himself had withdrawn the blood from Dickey. However, on cross-examination, Thill testified that he had, in fact, not taken the blood from Dickey. Thill testified that he had twice attempted to obtain a blood sample from Dickey but was unsuccessful, so he had a female emergency room nurse draw the blood.

¶6 Dickey then objected to the introduction of the blood test results, arguing that a chain of custody issue had arisen because Thill was not the person who had actually withdrawn the blood. Dickey also argued that the blood draw was in violation of WIS. STAT. § 343.305(5)(b), which allows a blood draw only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician. Dickey argued that because it was unknown who exactly drew the blood, no evidence was presented demonstrating that the requirements of § 343.305(5)(b) had been met. The trial court overruled both objections, holding that there was no chain of custody issue nor any violation of § 343.305(5)(b) because Thill indicated that he had supervised the entire blood draw and the blood had been taken under his direction.

¶7 After trial, Dickey was found guilty of both charges and a judgment of conviction was entered on September 11, 2000.

DISCUSSION

¶8 Application of the implied consent statute to an undisputed set of facts, like any statutory construction, is a question of law that this court reviews de novo. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999).

¶9 Dickey argues that the blood test result should have been suppressed because a forced blood draw is not authorized under the Implied Consent Law. We disagree.

¶10 The Implied Consent Law was enacted to battle drunk driving and designed to assist in the collection of evidence and to secure convictions. ***Id***. at 223-24. The Implied Consent Law was not designed to augment the rights of alleged drunk drivers. ***Id***. at 224. Given this purpose, we must liberally construe the Implied Consent Law. ***Id***. at 224-25.

¶11 Dickey cites ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), in support of his argument that there is no authority for a forcible blood draw. In ***Quelle***, we stated that "a driver has a 'right' not to take the chemical test (although there are certain risks and consequences inherent in this choice)." ***Id***. at 277. This right, Dickey argues, mandates that when an arrested person refuses a chemical test, police efforts must stop and the officer must follow only the statutory procedures created by the legislature under the Implied Consent Law. This reliance on ***Quelle*** is misplaced.

¶12 ***Quelle*** did not address the issue at hand. ***Quelle*** simply means that a suspect has the right not to voluntarily take a chemical test, a right to revoke his or her consent, subject to the risks and consequences of this choice. The ***Quelle*** court did not have the opportunity to consider whether a suspect's refusal must be honored on all occasions. This interpretation is in accord with cases that

consistently hold that, under appropriate circumstances, a suspect's blood can be withdrawn notwithstanding lack of consent. *See* ***Schmerber v. California***, 384 U.S. 757, 770-71 (1966); ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993).

¶13 In addition, Dickey's argument contradicts our supreme court's frequent holding that a driver in this state has no right to refuse to take a chemical test. "The consent is implied as a condition of the privilege of operating a motor vehicle upon state highways. By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." ***State v. Zielke***, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987); *see also* ***Reitter***, 227 Wis. 2d at 225. Dickey does not have a right to refuse to submit to evidentiary testing.

¶14 Refusal to submit to a chemical blood test under WIS. STAT. § 343.305 is a separate substantive offense from OWI under WIS. STAT. § 346.63(1). While it appears that the Implied Consent Law does supply the exclusive remedy for a violation of its provisions, it does not logically follow that the statute precludes police officers from following other constitutional avenues for collecting evidence. ***Zielke*** held that § 343.305 is not the exclusive means by which police can obtain chemical test evidence of driver intoxication. ***Zielke***, 137 Wis. 2d at 41. Thus, evidence from a warrantless blood draw is admissible, ***Bohling***, 173 Wis. 2d at 533-34, and the trial court properly denied Dickey's motion to suppress the blood test results on this basis.

¶15 Dickey also argues that no evidence was presented that the blood withdrawal was completed by a person authorized to do so under WIS. STAT. § 343.305(5)(b). We agree. The ***Bohling*** court held that "'blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and

bodily integrity,' *especially when performed according to accepted practices by trained medical personnel at a hospital*." ***Bohling***, 173 Wis. 2d at 547 (citation omitted; emphasis added). ***Bohling*** adopted the three ***Schmerber*** requirements permitting blood to be taken incident to a lawful arrest without a warrant and over the arrestee's objection, including the requirement that "the method used to take the blood sample is 'a reasonable one' and 'performed in a reasonable manner.'" ***Bohling***, 173 Wis. 2d at 537. We are satisfied that § 343.305(5)(b) codifies the requirements of obtaining a warrantless blood sample from an arrested test subject and are applicable to Dickey's blood withdrawal.

¶16 WISCONSIN STAT. § 343.305(5)(b) states, in relevant part,

> Blood may be withdrawn from the person arrested … to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood *only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician*. (Emphasis added.)

A blood urine analysis introduced as evidence at trial indicates that Thill collected the blood sample from Dickey. At trial, Thill testified on direct examination that he was a medical technologist and that he had drawn the blood sample from Dickey. However, on cross-examination, Thill admitted that he was not, in fact, the one who took the blood. Thill testified that he had attempted to draw blood twice, but was unsuccessful, so he had a female emergency room nurse draw the blood instead.

¶17 The trial court held, and the State argues, that this nurse drew the blood under Thill's supervision and therefore the mandates of WIS. STAT. § 343.305(5)(b) were met. This is inaccurate. Section 343.305(5)(b) mandates that the blood be taken "only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." The nurse was acting under the supervision of Thill, who is a medical technologist, not a physician as required by § 343.305(5)(b). No evidence was presented as to the nurse meeting the qualifications of § 343.305(5)(b). Therefore, the blood withdrawal does not meet the statutory requirements. The blood test results must be suppressed unless the State can establish that the withdrawal did in fact comply with this statutory requirement.

¶18 The State argues that this statutory violation constitutes harmless error, at best, and that "there is no reason to believe that the State would not have met its burden of proof, nor that the jury would not have returned a guilty verdict on the OWI charge had the evidence in dispute … been excluded from trial." If that is the case, the State should have no trouble securing a conviction if it fails to establish that the nurse who withdrew the blood met the requirements of WIS. STAT. § 343.305(5)(b).

CONCLUSION

¶19 We reject Dickey's argument that the trial court erred when it allowed blood test results to be admitted into evidence. However, we agree that no evidence was presented that the blood withdrawal was completed by a person authorized to do so under WIS. STAT. § 343.305(5)(b). We therefore reverse the judgment of conviction and remand this matter to the trial court to give the State an opportunity to establish that the requirements of § 343.305(5)(b) were met. If

compliance cannot be shown, Dickey is entitled to a new trial where the results of the blood test must be suppressed.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.